

COMMITTEE FOR PUBLIC COUNSEL SERVICES

PERFORMANCE STANDARDS

GOVERNING THE REPRESENTATION OF INDIGENT PERSONS IN “SEXUALLY DANGEROUS PERSON” PROCEEDINGS

These standards generally describe the steps which should be taken by an attorney who is assigned pursuant to G.L. c. 123A, § 9 or § 12 to represent a person facing commitment to or continued confinement at the Massachusetts Treatment Center for Sexually Dangerous Persons (Treatment Center) in Bridgewater as a “sexually dangerous person” (SDP).

1. The role of the attorney in a SDP commitment case is to act as an advocate for the client, and to insure that the client is afforded all of his or her due process and other rights. *Cf. In the Matter of the Mental Health of KGF*, 306 Mont. 1; 29 P.3d 485 (2001). At a minimum, counsel must do his or her best to insure that the Commonwealth is made to sustain its burden of proving, beyond a reasonable doubt, that the client meets the criteria for commitment.

2. Immediately upon receipt of the assignment of a case the attorney shall: (a) file an appearance in court; (b) communicate with the client to inform the client of the assignment; (c) arrange to meet with the client as soon as possible (see also ¶ 3, below), and (d) promptly begin work on the case. If the attorney's schedule does not permit him or her to fulfill these requirements, the attorney shall decline the assignment absent special arrangements with the CPCS Mental Health Litigation Director or the SDP Litigation Coordinator. The attorney shall not agree to a continuance of the case without first consulting with the client and obtaining his or her express agreement.

3. In proceedings under § 12, the attorney shall meet with the client at the Treatment Center at the earliest possible opportunity prior to the probable cause hearing; absent serious and unavoidable scheduling conflicts, this meeting shall take place within ten days of the attorney's appointment. In proceedings under § 9, the attorney shall meet with the client as soon as practicable. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, to explain the SDP law and procedures to the client, to determine the client's version of the pertinent facts, and to determine the client's wishes regarding the litigation. The attorney should seek to obtain from the client written authorization to examine the client's Department of Correction (DOC), medical, and treatment records or, where the client is unable or unwilling to provide such authorization, a court order authorizing such examination. Finally, the attorney shall inform the client of his or her right to independent evaluations, and shall discuss hiring independent evaluators at the expense of the Commonwealth.

4. During all hearings and throughout his or her representation of the client, the attorney shall act as a zealous advocate for the client, insuring that the proper procedures are followed, and that the client's interests are well represented.

5. Except as described herein, the attorney shall file a motion for funds for an independent examination at the Commonwealth's expense as soon as practicable. The client should be advised that such an examination will take time and may cause delay. While it is usually advisable to delay the probable cause hearing until such time as a defense expert is retained and sufficiently prepared, counsel need not retain an expert where the client, after being fully informed of his or her rights by the attorney, decides that he or she would rather proceed to the probable cause hearing as quickly as possible than take the time necessary for the expert to be retained and prepare for the hearing.

6. Upon the allowance of his or her motion for funds, the attorney shall retain the services of one or more capable independent forensic or clinical evaluators in sufficient time for them to prepare for and testify at the probable cause hearing or § 9 hearing. The attorney shall make a determination, based upon the circumstances of the particular case (*e.g.*, the risk assessment methodology relied upon by the Commonwealth's expert), as to which independent evaluators likely would be of most assistance to the attorney and client. If the attorney is unfamiliar with the different schools of sex offender risk assessment and their adherents, he or she shall contact the SDP Litigation Coordinator to discuss the matter. The attorney shall make an informed decision concerning whether it is wiser to have the evaluator(s) examine the client or concentrate solely on challenging the conclusions of the Commonwealth's experts. Such decision shall be based on caselaw (*see, e.g., Commonwealth v. Reese*, 438 Mass. 519 (2003)) and the strengths and weaknesses of both the client's and the Commonwealth's case.

7. The attorney shall inform the evaluators in writing that their reports, and any information gleaned in the process of conducting their examinations, are the property of the client and should be sent or divulged only to the attorney, and that the report is not to be filed with the court or disclosed to the Commonwealth or to the Treatment Center attorney or staff without the express permission of the attorney. *See Commonwealth v. Thompson*, 386 Mass. 811 (1982). Except where the evaluator is hired solely to challenge the methodology of the Commonwealth's experts, the attorney shall remind the evaluator(s) that the purpose of the examination is to evaluate: (i) whether the client currently suffers from a mental abnormality or personality disorder; (ii) if so, whether the mental abnormality or personality disorder makes the client likely to engage in sexual offenses if not confined to a secure facility; and (iii) whether the client suffers from impaired volitional control.

8. At the probable cause hearing, except where a Commonwealth's expert concludes that the client is not a sexually dangerous person, the attorney shall move to exclude such expert's opinion concerning the client's risk of reoffense and/or other conclusions as unreliable pursuant to *Commonwealth v. Lanigan*, 419 Mass. 15, 24-27 (1994), and for any other viable ground. A model *Lanigan* motion is available from the SDP Litigation Coordinator.

9. Counsel shall file a Motion for Release from Temporary Commitment pursuant to G.L. c. 123A, § 12(e), whenever the pendency of the SDP proceeding prevents the client's release from custody following the expiration of his or her underlying sentence.

10. The attorney shall provide informed advice to the client as to whether, and if so when, he or she should participate in any evaluations sought to be conducted by the Commonwealth's experts.

11. The attorney shall request transcripts of the probable cause hearing in all cases where probable cause is found, and shall forward a copy thereof to the SDP Litigation Coordinator.

12. Upon a finding of probable cause, the attorney shall move for funds sufficient to retain the services of at least two independent forensic or clinical evaluators to evaluate the client, to assess the conclusions of the Commonwealth's experts and the reliability and foundation thereof, to otherwise assist counsel in preparation for trial, and to testify at trial. The attorney shall otherwise follow the standards regarding expert witnesses outlined in paragraphs [6](#) and [7](#), *supra*.

13. The attorney shall thoroughly investigate the facts. This investigation shall include reading the complete records provided by the DOC and the Commonwealth, including police reports and all other records from the client's past criminal offenses, and interviewing institutional staff at DOC institutions, including the Treatment Center, prior therapists or other evaluators or treatment providers, family members, friends, and other persons who might provide evidence about the client. If the attorney is unable to perform such investigation him or herself, he or she shall file a motion with the trial court

requesting funds to hire an investigator to perform these tasks. The attorney shall familiarize him- or herself with the scientific literature regarding sexual disorders and recidivism risk assessment sufficiently to undertake, with the assistance of the defense experts, a searching review of the Commonwealth's experts' reports to determine the factual and scientific legitimacy of their findings.

14. The attorney shall use formal discovery mechanisms to the extent permitted by the trial court. The attorney shall subpoena all of the Commonwealth's experts' files regarding the client, and, if permitted by the court, shall depose all Commonwealth's experts.

15. After reviewing the medical record and the Commonwealth's pleadings the attorney shall determine if any procedural defenses or objections can be raised and, if appropriate, file appropriate motions with supporting memoranda. [Procedural defenses can be raised, for example, if the client has completed his or her sentence for a sexual crime and has subsequently been re-incarcerated for a non-sexual offense (*See Commonwealth v. McLeod*, 437 Mass. 286 (2002)); if the Court failed to schedule a timely probable cause hearing (*See Commonwealth v. Bruno*, 432 Mass. 489, 513 (2000)); if the Commonwealth fails to petition for trial within 14 days of the filing of the qualified examiners' reports (*See Commonwealth v. Kennedy*, 435 Mass. 527 (2001)); or if the Commonwealth fails to bring the respondent to trial within sixty (60) days of the conclusion of the probable cause hearing (*See Kennedy*, *supra*; *Commonwealth v. Gagnon*, 439 Mass. 826 (2003)).] As at the probable cause hearing, see ¶ 8, *supra*, the attorney shall move for the exclusion of the Commonwealth's expert witnesses' opinions concerning the client's risk of reoffense and/or other conclusions as unreliable pursuant to *Commonwealth v. Lanigan*, 419 Mass. 15, 24-27 (1994), except where a particular Commonwealth's expert concludes that the client is not a sexually dangerous person. The attorney shall move to preclude the Commonwealth's experts or any other Commonwealth witness from testifying to inadmissible information (e.g., hearsay or privileged communications, *See Commonwealth v. Markvart*, 37 Mass. 331 (2002)), or from offering an opinion which does not comport with the evidentiary requirements of *Markvart* and *Department of Youth Servs. v. A Juvenile*, 398 Mass. 516, 531 (1986). If motions to exclude testimony are denied, the attorney shall renew objections to all such testimony when offered at trial or hearing. *See Commonwealth v. DiGiacomo*, 57 Mass. App. Ct. 312 (2003); *Commonwealth v. Gabbidon*, 398 Mass. 1, 7 (1986).

16. After developing a thorough knowledge of the law and facts of the case, the attorney shall meet again with his or her client for the purpose of discussing strategy for the trial or § 9 hearing.

17. Prior to trial or § 9 hearing, the attorney shall identify and subpoena potential witnesses who will testify in support of the client. The attorney shall meet with the witnesses in advance of trial in order to prepare them for direct- and cross-examination. The attorney shall review the record and identify those parts of the record which should not be admitted into evidence. The attorney shall determine the identity of the Commonwealth's witnesses in advance of trial, and, should the court deny the attorney's motion to depose such witnesses, shall attempt to interview them. The attorney shall prepare appropriate cross-examination. The attorney shall discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney shall thoroughly prepare the client for direct- and cross-examination.

18. In proceedings under § 9, or upon the filing by the Commonwealth of a petition for trial pursuant to G.L. c. 123A, § 14(a), the attorney shall enter a jury demand, and shall prepare for trial on the presumption that the case will be tried to a jury. Thereafter, the jury demand shall be withdrawn only upon the informed decision of the client.

19. Absent compelling circumstances, the attorney shall move for individual *voir dire* of all members of the jury panel.

Post-Trial

20. After trial or § 9 hearing, the attorney shall meet with the client to explain the court's decision. If the client is committed or ordered to remain at the Treatment Center, the attorney shall explain the client's right to appeal. Absent specific and knowing instructions from the client to the contrary, the attorney shall file a timely notice of appeal, a request for a cassette (or, if available, an electronic) copy of the proceedings, and a motion for funds for the transcription thereof. Where an appeal is filed, the attorney shall, without delay, notify CPCS' Mental Health Litigation Unit in order that appellate counsel may be assigned. The attorney shall cooperate fully with appellate counsel. If the client is newly committed to the Treatment Center, the attorney shall also explain to the client his or her right to file a petition for discharge in the superior court under G.L. c. 123A, § 9.

Section 9 Proceedings

21. If the attorney is appointed to represent the client pursuant to a petition for discharge under G.L. c. 123A, § 9, the attorney shall follow all of the steps outlined above except for those pertaining to probable cause hearings. In addition, the attorney shall move the court for a speedy hearing on statutory and constitutional grounds. The attorney may obtain a model motion for a speedy hearing from the SDP Litigation Coordinator.